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No. 91-1186

In the Supreme Court of the United States

OCTOBER TERM, 1991

WALKER BENNETT MONROE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court properly declined to depart from the federal Sentencing Guidelines to equalize petitioner's sentence with the sentence of a co-defendant who had pleaded guilty to different charges.

2. Whether the district court improperly penalized petitioner for exercising his right to a jury trial when it imposed a higher sentence after petitioner's trial than a different judge had imposed on his co-defendant, who pleaded guilty to different charges.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A, at 11497-11523) is reported at 943 F.2d 1007.

JURISDICTION

The judgment of the court of appeals was entered on August 21, 1991. A petition for rehearing was denied on October 22, 1991. Pet. App. B. The petition for a writ of certiorari was filed on January 17, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of California, petitioner was convicted on one count of conspiracy to import marijuana, in violation of 21 U.S.C. 952, 960, and 963; one count of conspiracy to travel in interstate and foreign commerce in aid of racketeering and to launder monetary instruments, in violation of 18 U.S.C. 371; one count of traveling in aid of racketeering, in violation of 18 U.S.C. 1952(a)(3); two counts of laundering monetary instruments, in violation of 18 U.S.C. 1956(a)(2)(A); and three counts of using a communication facility to facilitate the commission of a drug felony, in violation of 21 U.S.C. 843(b). The district court sentenced him to a 169-month term of imprisonment, to be followed by a five-year term of supervised release. The court of appeals affirmed. Pet. App. A.

1. In the late 1980's, petitioner, Michael McCabe, and Daniel Bender were members of a conspiracy to import several tons of marijuana from Thailand to the United States. After Bender was arrested on an unrelated drug charge in February 1988, he became a confidential informant for the government. As the conspiracy developed, the conspirators decided, at petitioner's suggestion, that the marijuana should be shipped in sea containers to Mexico and then smuggled into the United States by truck. Before the marijuana was imported, petitioner and McCabe were arrested. Pet. App. A, at 11501-11504.

2. Petitioner and McCabe were charged in a nine-count indictment on various charges relating to the marijuana smuggling venture. McCabe reached an agreement with the government under Fed. R. Crim.

P. 11(e)(1)(C),[1] pursuant to which he pleaded guilty to only two counts: one of the telephone facilitation counts and an unrelated pre-Guidelines marijuana importation conspiracy count. Pet. 8. The plea agreement specified that the sentence on the telephone facilitation count would be between 37 and 46 months' imprisonment and a maximum fine of $25,000, and that the defendant would be placed on five years' probation on the conspiracy count; the plea agreement did not specify what the fine would be on the conspiracy count. McCabe Plea Tr. 9.[2] McCabe's Presentence Report calculated his Guidelines range on the facilitation count at 6-12 months' imprisonment, but recommended that the judge depart upward and impose a 48-month term of imprisonment (the statutory maximum) based on the seriousness of the other charges against McCabe, which had been dropped pursuant to the plea agreement. McCabe Presentence Report 11, 18. The report also recommended that McCabe receive a five-year suspended sentence on the conspiracy count. *Id.* at 20. The district court departed upward and sentenced McCabe, in accordance with his plea agreement, to 38 months' imprisonment and a $25,000 fine on the facilitation charge, and to five years' probation and a $25,000 fine on the conspiracy charge. McCabe Sentencing Tr. 15-18.

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[1] Rule 11(e)(1)(C) permits the government and the defendant to reach an agreement "that a specific sentence is the appropriate disposition of the case."

[2] "McCabe Plea Tr." refers to the transcript of McCabe's plea hearing on May 22, 1989. "McCabe Presentence Report" refers to McCabe's Presentence Report. "McCabe Sentencing Tr." refers to the transcript of McCabe's sentencing hearing on August 7, 1989. Those documents were made part of the record in Monroe's case pursuant to a March 21, 1991, order of the court of appeals.

Although the government offered petitioner the same plea bargain it had offered to McCabe, petitioner rejected it. Sept. 25, 1989, Tr. 180-181.[3] At trial, the jury found petitioner guilty on eight counts of the indictment. His presentence report calculated the Guidelines sentencing range at 262 to 327 months' imprisonment, based on an adjusted offense level of 39 and criminal history category of I. Presentence Report 15.[4] Petitioner contended that petitioner and McCabe had been found guilty of similar conduct and thus should receive similar sentences. At petitioner's sentencing hearing, which was conducted by a judge other than the judge who had sentenced McCabe, the judge rejected petitioner's argument, explaining that she knew of "nothing under the law that would say I can depart downward because of a sentence that another Defendant got under circumstances over which I had no control." Sept. 25, 1989, Tr. 134. The district court then determined that petitioner's Guidelines sentencing range was 151 to 188 months' imprisonment,[5] and sentenced petitioner to 169

[3] "Sept. 25, 1989, Tr." refers to the transcript of petitioner's initial sentencing hearing on September 25, 1989. "Sept. 28, 1989, Tr." refers to the transcript of the conclusion of petitioner's sentencing hearing on September 28, 1989.

[4] The report's calculation rested on a base offense level of 36 (because the conspiracy involved more than 10,000 kilograms of marijuana), an increase of two levels based on petitioner's role in the offense, and an increase of one level under the grouping rules in Sentencing Guidelines § 3D1.4, based on petitioner's traveling in aid of racketeering and money laundering. Presentence Report 11-13.

[5] The court's calculation differed from the calculation in the presentence report, because the court found that the offense level was only 36, rather than 39. The difference resulted from the court's determinations that the evidence could establish only that the conspiracy involved six tons of marijuana

months' imprisonment, to be followed by a five-year term of supervised release. Sept. 28, 1989, Tr. 14-15.[6]

3. The court of appeals affirmed. Pet. App. A, at 11497-11523. It rejected (*id.* at 11517-11518) petitioner's argument that the district court erred in refusing to depart downward from the Sentencing Guidelines to equalize his sentence with McCabe's, noting that petitioner and McCabe were not similarly situated because they were not convicted of the same offenses. *Id.* at 11517. The court went on to note that, even if petitioner and McCabe had been similarly situated, it was not clear that the desire to equalize sentences could be a permissible basis for departure. *Id.* at 11518. Finally, the court noted that petitioner's argument was especially weak because he was sentenced before a different judge than McCabe. *Ibid.*

The court of appeals also rejected (Pet. App. A, at 11518-11519) petitioner's contention, raised for the first time on appeal, that the disparity between his sentence and McCabe's demonstrated that petitioner had been penalized for exercising his right to stand trial. Relying on the court of appeals' pre-Guidelines decision in *United States* v. *Capriola*, 537 F.2d 319 (9th Cir. 1976), petitioner argued that the court of appeals should remand the case to the district court

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(reducing the base offense level by two) and from the court's determination that the base offense level should not be increased one level under the grouping rules in Sentencing Guidelines § 3D1.4. Sept. 28, 1989, Tr. 4-5.

[6] The court explained its selection of the 169-month sentence as being in the middle of the Guidelines range. The court noted that petitioner's status as a "long-time, large-scale drug trafficker" supported a sentence at the "higher end" of the range, but that "humanitarian concerns for which I find that I cannot depart" supported a sentence at the lower end. Sept. 28, 1989, Tr. 14-15.

and require the court to enter findings that explain the disparity. The court noted that *Capriola*'s requirement that a judge account for sentencing disparities had largely been "obviated" by the promulgation of the Sentencing Guidelines, which themselves provide a statement of reasons for each defendant's sentence. Pet. App. A, at 11519. In any event, the court found *Capriola* inapplicable because "the record states clearly the reasons given for [petitioner's] sentence." *Ibid.*

ARGUMENT

1. Petitioner first contends (Pet. 20-26) that he was entitled to a downward departure from his Guidelines sentence to avoid unwarranted disparity between his sentence and that of his co-defendant McCabe. Petitioner's argument ignores the fact that, as the court of appeals found (Pet. App. A, at 11517), petitioner and McCabe are not "similarly situated." McCabe elected to accept the government's plea offer and was convicted on one relatively minor drug offense under the Sentencing Guidelines and on one unrelated pre-Guidelines offense. Petitioner did not accept the plea offer and was convicted on eight Guidelines offenses, several of them serious offenses. See *United States* v. *Butt*, No. 91-1227 (1st Cir. Jan. 27, 1992), slip op. 31-32 (defendants convicted of different offenses not similarly situated under Guidelines); *United States* v. *Font-Ramirez*, 944 F.2d 42, 50 (1st Cir. 1991) (defendants with different sentencing factors not similarly situated), cert. denied, 112 S. Ct. 954 (1992); *United States* v. *Rios*, 893 F.2d 479, 481 (2d Cir. 1990) (co-defendant's guilty plea constitutes different circumstances for purposes of determining Guideline sentence).

In any event, petitioner errs in suggesting (Pet. 20-26) that there is "conflict and disarray" in the circuits, based on the assertion that decisions of the Fourth, Sixth, and Ninth Circuits clearly have established the authority of district courts to depart from a Guidelines range to prevent a disparity in Guidelines sentences for similarly situated co-defendants. In fact, no court of appeals has squarely held that such a departure is appropriate. The Fourth Circuit decision on which petitioner relies (Pet. 23), *United States* v. *Daly*, 883 F.2d 313 (1989), cert. denied, 496 U.S. 927 (1990), involved an appeal by a defendant who had received such a departure, but contended that the departure was insufficient. The court of appeals stated in dictum that some departure to reduce disparity might be warranted in some circumstances, but it rejected Daly's contention that the departure he had received was inadequate. 883 F.2d at 319. Similarly, the Sixth Circuit decision on which petitioner relies (Pet. 23-24), *United States* v. *Nelson*, 918 F.2d 1268 (1990), stated in dictum that such departures might be justified in unusual cases, *id.* at 1271-1273, but it reversed the departure before it, *id.* at 1273-1275.[7] Finally, the decisions of the Ninth Circuit on which petitioner relies (Pet. 25) involved the discrete question whether such a departure is appropriate in the unusual circumstance where the co-defendant was sentenced under pre-Guidelines rules. See *United States* v. *Ray*, 930 F.2d 1368, 1372 (1990); *United States* v. *Boshell*, 952 F.2d 1101, 1108 (1991). In cases like petitioner's, involving two

[7] Moreover, the Sixth Circuit's position on this point well may be clarified, because that court has granted en banc review of a panel decision reversing such a departure, see *United States* v. *Gessa*, 944 F.2d 265 (1991), reh'g granted (Nov. 8, 1991).

defendants who both were sentenced under the Guidelines, the Ninth Circuit consistently has held such departures inappropriate. See, *e.g.*, *United States* v. *Mejia*, No. 91-50005 (9th Cir. Feb. 19, 1992), slip op. 1646-1647 & n.2 (distinguishing *Ray* on this ground); *United States* v. *Carpenter*, 914 F.2d 1131, 1135-1136 (9th Cir. 1990); *United States* v. *Enriquez-Munoz*, 906 F.2d 1356, 1358-1360 (9th Cir. 1990); see also *United States* v. *Ray*, 930 F.2d at 1372 n.7 (reaffirming *Enriquez-Munoz* in a pure Guidelines context). In any event, any tension between those decisions and the result in this case is a matter for resolution by the Ninth Circuit, not this Court. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

2. Petitioner also claims (Pet. 26-29) that the district court failed to assure that his Sixth Amendment right to a jury trial was protected by stating reasons for imposing a different sentence on petitioner after trial than a different judge had imposed on his co-defendant. He ignores, however, the court of appeals' express finding that "the record states clearly the reasons given for his sentence." Pet. App. A, at 11519. Moreover, the court of appeals was correct in recognizing that the adoption of the Sentencing Guidelines obviates the need for such a rule. See, *e.g.*, *Font-Ramirez*, 944 F.2d at 50 ("The guidelines do not require the sentencing court to consider related cases or to justify a sentence in terms of the punishment meted out to co-defendants."); *United States* v. *Lanese*, 937 F.2d 54, 58 (2d Cir. 1991) ("Having concluded that the guidelines were properly applied, * * * we fail to see the purpose of a remand [to require the district court to explain a disparity in sentencing].").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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